

and "full and complete cargo", but the court cannot find anything in the cases which can be of assistance to him.

As I have indicated above, that depends upon a construction of the relevant clauses in the policy and the circumstances in which they were made and to which they relate.

As appears quite clearly from the cases cited by counsel for the defendants, the claim must fail for the reasons given.

It was also suggested in argument by counsel for plaintiff that the defendants are estopped by their admission in paragraph 1 of their defence.

It is true the defence referred to salvage charges in paragraph 1 of their statement of defence, but it is to be observed that the defendants proceeded on the assumption that they were as stated in paragraph 1 of the statement of claim.

The plaintiff has not adduced any evidence to show that they are indeed salvage charges.

On the view I take there really was no evidence before the court capable of supporting the existence of salvage charges.

While feeling a certain amount of sympathy with the plaintiff under the circumstances I am unable to see on what grounds it can possibly be held that he is entitled to any of the expenses incurred (Items (19) and (20) having been abandoned during the trial by counsel for the plaintiff).

I would therefore dismiss the claim with costs.

Claim dismissed.

ONG CHAT PANG & ANOR. v. VALLIAPPA CHETTIAR

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) January 4, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 31 of 1970]

Land Laws — Contract for sale of land — Effect of — Covenant — Registration of caveat by Registrar of Titles — Petition against rejection — Claim for specific performance of contract of sale against person claiming title from vendor under registered sale-deed executed after the contract — Onus on defendant to show that he is a bona fide purchaser for value — Land Code (F.M.S. Cap. 138), ss. 42, 237 — Specific Relief (Malay States) Ordinance, 1950, s. 26.

The first and second defendants in this case had agreed in writing on November 2, 1957 to sell their land to the plaintiff for \$30,000. The plaintiff paid \$15,000 towards the agreed purchase price before January 24, 1958 on which date he lodged a caveat against the land with the Registrar of Titles. On the same day the third and fourth defendants approached him and offered to pay him \$10,000 to give up his rights under the agreement and to withdraw his caveat. He refused. On the morning of January 30, 1958 he called at the land office and discovered that his caveat had been rejected and that the land had been registered in the names of the third and fourth defendants in pursuance of a document of transfer in their favour, purporting to have been executed on January 17, 1958 but stamped and presented for

A registration on January 30, 1958. On a petition to the High Court against the rejection of his caveat the plaintiff obtained an order on May 5, 1958 directing the Registrar of Titles to register his caveat as on the date of its presentation with a further direction that the caveat be removed after four weeks from the date of the order unless within that period the plaintiff brought an action for specific performance of the sale agreement against the first and second defendants as the registered owners of the land at the time of the presentation of the caveat and against the third and fourth defendants as interested parties. The plaintiff commenced his action on May 31, 1958. The first and second defendants took no steps to defend the action and the third and fourth defendants did not adduce any evidence at the trial. The High Court gave judgment for specific performance of the agreement. Against this judgment the second and third defendants appealed.

C **Held**, dismissing the appeal; in this case the onus of proof was on the third and fourth defendants as persons claiming by a title subsequent to the contract for sale, to show that they were *bona fide* purchasers for value without notice of the earlier contracts and as they had failed to do so, judgment had rightly been given against them in favour of the plaintiff.

Cases referred to:-

- D (1) *Bhup Narain Singh v. Gokhul Chand Mahton & Ors.* L.R. 61 I.A. 115.
- (2) *Shaw v. Foster* (1872) L.R. 5 H.L. 321, 333, 338.
- (3) *Lysaght v. Edwards* (1876) L.R. 2 Ch. D. 499.
- (4) *Rayner v. Preston* (1880) L.R. 18 Ch. D. 1, 13.
- (5) *Cornwall v. Henson* [1899] 2 Ch. 710, 714.
- (6) *Crowly v. Berghtheil* [1899] A.C. 374, 390.
- E (7) *Howard v. Miller* [1915] A.C. 318, 326.
- (8) *Abdulla v. Shah* [1959] A.C. 124, 131.
- (9) *Tan Ah Boon v. State of Johore* [1934] M.L.J. 142, 151.
- (10) *Chin Cheng Hong v. Hameed & Ors.* [1954] M.L.J. 169, 170.
- (11) *Haji Abdul Rahman v. Mohamed Hassan* [1917] A.C. 209 at pp. 215, 216.
- F (12) *Bachan Singh v. Mahinder Kaur & Ors.* [1956] M.L.J. 97.
- (13) *Port Swettenham Rubber Company Case* [1913] A.C. 491.
- (14) *London and South Western Railway Co. v. Gomm* (1882) L.R. 20 Ch. D. 562, 581.
- (15) *Abigail v. Lapin* [1934] A.C. 491, 500.
- (16) *Barry v. Heider* (1914) 19 C.L.R. 197.
- G (17) *Great West Permanent Loan Co. v. Friesen* [1925] A.C. 208.
- (18) *Hawkins v. Gaden* (1925) 37 C.L.R. 183, 207.
- (19) *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamed* [1952] M.L.J. 37.
- H (20) *Butler v. Fairclough* (1917) 23 C.L.R. 78, 91.
- (21) *In re Registration of Caveat* (1908) Innes 114.
- (22) *Municipal District of Concord v. Coles* (1905-06) 3 C.L.R. 96, 108.
- (23) *Craig v. Kanssen* [1943] 1 K.B. 256.
- (24) *Frazer v. Walker* [1967] 1 A.C. 569.
- (25) *Yong Joo Lin & Ors. v. Fung Poi Fong* [1941] M.L.J. 63.
- I (26) *Bank of New South Wales v. O'Connor* (1889) 14 App. Cas. 273, 283.

The following authorities were also cited in argument: *Rawther v. Kassim* [1959] M.L.J. 257; *Registrar of Titles v. Collector of Land Revenue* [1931-32] F.M.S.L.R. 9, 10; *Jasper's Caveat* [1923] V.L.R. 650, 652; *Registrar of Titles, N.S. v. Sockalingam Chetty* 4 F.M.S.L.R. 58; *Castrisque v. Imrie* (1870) 4 English & Irish App. Cases, p. 414, 427-9;

Francis Times & Co. v. Carr (1900) 82 L.T.R. 701; *Poulton v. Adjustable Cover & Boiler Block Co.* [1908] 2 Ch. 430, 439; *Tay Teck Huay v. Thor Hor Chooi* [1954] M.L.J. 227; *Peninsular Land Development Sdn. Bhd. v. K. Ahmad* [1970] 1 M.L.J. 149, 151; *Soar v. Ashwell* [1893] 2 Q.B. 390, 396; *Barnes v. Addy* (1874) 9 Ch. App. 244, 251; *Potter v. Sanders* 67 E.R. 1057; *Shankas Lal Naroyandas v. New Mofussil Co.* 224 I.C. 598 or 73 I.A. 98 or A.I.R. 1946 P.C. 97; *I.A.C. v. Courtenay* 110 C.L.R. 550; *Valipuram v. Palaniappa* [1937] M.L.J. 59, 60; *Phillips v. Phillips* 45 E.R. 1164; *Nawab v. Hukam Din* A.I.R. 1925 Lahore 605; *Sangali Solagan v. Nagamuthu Malavadi* A.I.R. 1925 Madras 227; *Oughtred v. I.R.C.* [1960] A.C. 206, 239-40; *Goldsbrough v. Quinn* (1910) 10 C.L.R. 674; *Summers v. Cocks* (1927) 40 C.L.R. 321.

FEDERAL COURT.

N. A. Marjoribanks for the appellants.

P. Mooney for the respondents.

Cur. Adv. Vult.

Suffian F.J.: The plaintiff (respondent) is a money-lender in Klang. The first and second defendants were partners in a firm, Universal Car Agency at 22 Rembau Street, Klang. (They are not concerned with this appeal.) The third defendant is a housewife and the fourth defendant is an associate in a firm, Tai Wah & Co. at 13, Batu Tiga Road, Klang. (They are the appellants in this appeal.)

On 2nd November, 1957, the plaintiff entered into a written agreement with the first and second defendants to purchase for \$30,000 the land in question upon which a house was being constructed (held under Selangor Grant for Land No. 13107 for Lot 404, Section 24 in the Town of Klang). The land was subject to a charge of \$15,000 in favour of the Malaya Borneo Building Society. The plaintiff paid the first and second defendants \$15,000 towards the purchase price. In January 1958 on hearing that the first and second defendants were in financial difficulties the plaintiff went to look for them in their shop but in vain, though he called there twice a day from 13th to 17th January.

After the 18th he noticed that the stock-in-trade in the shop was diminishing. The plaintiff then went to Kuala Lumpur to see the late Mr. Cumarasamy, his solicitor, who prepared a caveat, which was presented on 24th January. Later the same day at Klang the plaintiff saw the proprietor of Tai Wah & Co., the late Mr. Kuan Thian Soon, who was the younger brother of the fourth defendant. He told the plaintiff that he wanted to buy the land. The plaintiff refused to sell it and said that he had caveated it. Later that night the plaintiff and three friends called at Tai Wah's shop at Thian Soon's request. There he met Thian Soon and the third and fourth defendants. The fourth defendant said that the first and second defendants owed him money and that he would pay \$10,000 if the plaintiff would withdraw the caveat. The plaintiff did not agree to do so.

The next morning the plaintiff went to his solicitor's office in Kuala Lumpur to find out whether the caveat presented 7 days earlier had been registered. It had not been registered. For five or six days he visited Kuala Lumpur every day to check. Still it had not been registered.

On 30th January he went to the Land Registry, where he was informed that the caveat had been rejected and a transfer of the land registered that very day in favour of the third and fourth defendants. The relevant memorandum of transfer had been presented at 10.10 a.m. that morning: it had been executed on 17th January, 1958, but not stamped until 30th January.

The plaintiff petitioned to the High Court under section 237 of the F.M.S. Land Code against the rejection of his caveat. He cited the Registrar of Titles as respondent, but none of the defendants. On 5th May, 1958, Shepherd J. ordered —

- (1) the Registrar of Titles to register the plaintiff's caveat as on the date of its presentation (24th January, 1958), the caveat to remain till four weeks from the date of the order; and
- (2) that after four weeks had elapsed, the Registrar was to remove the caveat unless the plaintiff had previously instituted an action in the High Court for the specific performance of the alleged contract between him and the first and second defendants or damages, the "action to be an action joining the interested party as second defendant". Within the time given, the plaintiff on 31st May filed suit against all four defendants.

His claim was —

- (a) as against the first and second defendants for specific performance of their agreement;
- (b) for an order directing the Registrar of Titles to make the necessary memorials in the land register and issue document of title in the plaintiff's favour;
- (c) for an order cancelling the memorial in favour of the third and fourth defendants made in the register and issue document of title;
- (d) for an order directing the third and fourth defendants to deliver up the issue document of title to the Registrar of Titles to enable the necessary memorials in favour of the plaintiff to be made and directing that the issue document of title be delivered to the plaintiff for registration.

In his pleadings the plaintiff, after narrating the facts, alleges that the transfer in favour of the third and fourth defendants was effected fraudulently and that the third and fourth defendants were parties to the fraud. In their pleadings the third and fourth defendants, after admitting some facts and denying others, deny that they were parties to any fraud and say that Shepherd J's order was not binding on them as they were not parties to the plaintiff's petition and that their title was indefeasible by virtue of section 42 (i) and (iv) of the F.M.S. Land Code.

In his opening address in the lower court Mr. Mooney, counsel for the plaintiff, emphasized that fraud was an additional plea and submitted that the onus was on the third and fourth defendants to prove that they acted in good faith and they had to prove that (a) they were purchasers for value, (b) they were *bona fide* purchasers, and (c) they had no notice of the plaintiff's prior agreement for sale.

Eventually the suit came up for hearing before Abdul Hamid J. on 10th February, 1970. The first

and second defendants never entered appearance; an adjudication order had been made bankrupting the first defendant on 24th February, 1958, and the second defendant had disappeared.

In a reserved judgment delivered on 12th March, 1970, the learned judge gave judgment for the plaintiff.

The third and fourth defendants now appeal to this court.

As to the allegation by the plaintiff that the third and fourth defendants were guilty of fraud, the learned judge found that, though it was proved that on 24th January, 1958, (when the plaintiff presented his caveat) they knew that the plaintiff had agreed with the first and second defendants to buy the land and that the plaintiff had filed a caveat, there was no evidence that when the memorandum of transfer in favour of the third and fourth defendants was executed a week earlier (on 17th January) they knew of the previous sale agreement, and that accordingly the court could not infer fraud on the part of the third and fourth defendants.

The learned judge considered that the third and fourth defendants were not necessary parties to the petition filed by the plaintiff under section 237 of the Land Code, that it was within the competence of Shepherd J. to order the rejected caveat to be registered as on the date of its presentation (24th January), that the third and fourth defendants could have applied to the court to set aside that order but did not do so, that on the plaintiff filing this suit it fell to the court to decide on the legality or otherwise of the registration of the third and fourth defendants as proprietors, that the effect of section 169 was to render the purported registration null and void, that the first and second defendants legally remained the registered proprietors and that the third and fourth defendants had no title to the land. The learned judge then went on to consider the plaintiff's claim for specific performance of his contract with the first and second defendants and concluded that it was proper for him to order and he did order specific performance on payment by the plaintiff of the balance of the purchase price (\$15,000) and costs.

I now turn to the merits of this appeal.

When the plaintiff's caveat was rejected, in my opinion he did the right thing by applying under section 237 to the High Court for an order directing the Registrar of Titles to register his caveat. The material part of that section reads —

"237 (iii). . . [Any party dissatisfied with any decision of the Registrar] may apply to the Court by petition setting forth the particulars and the grounds for his dissatisfaction and thereupon the proper registering authority or the Collector shall be served with, and the Court shall have jurisdiction to hear such petition, and the Court shall make such order as the circumstances of the case may require; provided that where the Collector exercises any of the powers conferred upon him by this Enactment at the request of any person and for his benefit, the applicant shall instead of serving the Collector, serve as respondents such person and any other person who may appear to be a necessary party to the proper hearing of the petition."

The plaintiff served his petition only on the Registrar, not on any of the defendants, but I do not

A think that this failure was fatal. Section 273(iii) clearly said that only the registrar or collector need be served, and the proviso to it did not apply because, first, the registering authority here was the registrar and not a collector and, secondly, even if the proviso applied to a registrar, this was not a case of him exercising his powers but a case of him refusing to do so. Also, the third and fourth defendants could have applied to have Shepherd J.'s order set aside but failed to do so.

Did Shepherd J. have power to direct the Registrar of Titles to register the plaintiff's caveat and with effect from the date of its presentation, so as to nullify the appearance on the register as proprietors of the third and fourth defendants? I think that he had because subsection (iii) of section 237 provided that the court had jurisdiction to hear the plaintiff's petition and "shall make such order as the circumstances of the case may require"; and clearly the circumstances of the case required that the dispute between the parties be litigated. Shepherd J. did not in so many words order the deletion of the names of the third and fourth defendants from the register, though his order had that effect; but I think that had he wished to do so he could have done it because section 240 expressly provided that "in any proceeding . . . in respect of any caveat . . . the court may . . . direct the registering authority . . . to do such acts . . . as may be necessary to give effect to the . . . order of the court."

E I do not therefore agree with Mr. Marjoribanks for the third and fourth defendants that Shepherd J.'s order was a nullity.

F I do not agree that the plaintiff should, instead of petitioning under section 237, have re-presented his rejected caveat under section 84, for if he had done that and the registrar had accepted the caveat, he could only have registered it with effect from the moment of re presentation, i.e., long after the prior registration as proprietors of the third and fourth defendants; from the point of view of the plaintiff, such re-presentation would have been quite useless.

G What is the effect of the caveat at last appearing on the register? The caveat (addressed to the registrar) forbade the registration of any transfer of the land executed by the third and fourth defendants presented *subsequently* to the caveat. The third and fourth defendants' memorandum of transfer was in fact presented subsequently to the caveat, and in my view its registration was nullified by Shepherd J.'s order. That however did not nullify it for all purposes, for Shepherd J.'s order made it quite plain that the appearance of the caveat on the register was *subject to litigation*. In my view, the effect of this is to allow the court to adjudicate on the rival claims of the parties and, if the justice of the case requires, to remove the third and fourth defendants from the register and substitute for them the plaintiff.

I From the moment the plaintiff heard that the third and fourth defendants were also interested in the land, there began a race between them to get on the register, which race was won by the third and fourth defendants. Though the third and fourth defendants had executed their agreement with the first and second defendants

on 17th January, 1958, they did not manage to get on the register until 13 days later, and Mr. Marjoribanks explains from the bar that the delay was caused by the necessity of getting the charge in favour of the Building Society discharged first. There is no doubt in my mind that section 42 operated to make the title of the third and fourth defendants *prima facie* indefeasible. The material parts of that section read —

- "42 (i). The title of a proprietor... shall be indefeasible except as in this section provided.
- (ii). In the case of fraud... to which he is proved to be a party the title of such proprietor... shall not be indefeasible.
- (iii). If the registration of any proprietor... has been obtained by forgery or by means of an insufficient or void instrument, such registration shall be void.
- (iv). Nothing in sub-section (ii) or (iii) shall affect the title of a proprietor... who has taken *bona fide* for valuable consideration from any proprietor... whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him.
- (v). ...
- (vi). Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law."

To defeat the third and fourth defendants' title the plaintiff tried, but failed, to prove fraud on their part, and there is no cross-appeal against this finding, and for the purposes of this appeal I must therefore accept that there was no fraud on their part.

As has been seen, the third and fourth defendants claim in their pleadings that they have a good title by virtue, among others, of subsection (iv) of section 42, *i.e.*, on the ground that they acted in good faith throughout. It will be recalled that the plaintiff's claim is for specific performance. Section 26 of the Specific Relief (Malay States) Ordinance No. 29 of 1950 reads —

"Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against

- (a) either party thereto;
- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract; ..."

It is common ground that the third and fourth defendants' title was subsequent to the contract between the vendors and the plaintiff and that the third and fourth defendants claim title from the vendors who were parties to the earlier contract between them and the plaintiff. It is well settled that the onus is on the third and fourth defendants to prove that they were *bona fide* purchasers for value. This was so decided by the Privy Council in *Bhup Narain Singh v. Gokhul Chand Mahton and Others*⁽¹⁾ as long ago as in 1933. The headnote to that case says —

"Where the purchaser under a contract for the sale of immovable property claims under section 27 (b) of the Specific Relief Act, 1877 [corresponding to our section 26 (b)], a decree for specific performance against a person claiming title from the vendor under a registered sale-deed executed after the contract, the onus is on the defendant to prove that he is a *bona fide* purchaser for value without notice of the earlier contract so as to bring himself within the exception provided by the above section."

A Giving the advice of their Lordships, Lord Thankerton said at page 122 —

"In their Lordships' opinion, section 27 lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and, in their Lordships' opinion, it is clearly for the transferee to establish the circumstances which will allow him to retain the benefit of a transfer which, *prima facie*, he had no right to get. Further the subsequent transferee is the person within whose knowledge the facts as to whether he has paid and whether he had notice of the original contract lie, and the provisions of sections 103 and 116 of the Indian Evidence Act, 1872, have a bearing on the question. The plaintiff does not necessarily have knowledge of either matter."

C Section 103 of the Indian Evidence Act is the same as section 103 of our Evidence Ordinance, and section 116 in the above quotation appears to be a misprint for section 106 which is the same as our section 106.

D In the instant case, neither the third nor the fourth defendant, who were both in court during the trial chose to give evidence themselves or to call witnesses on their behalf to establish their *bona fides*. In the circumstances I am of the opinion that the learned judge was right to enter judgment for the plaintiff against the third and fourth defendants.

E Mr. Marjoribanks contends that there was evidence that the third and fourth defendants had paid the full purchase price of \$35,000, and he points to a letter dated 6th January, 1959, written by his office to the assistant official assignee, but I agree with Mr. Mooney that at best that was only second-hand evidence, because that letter said that Mr. Marjoribanks' firm had been merely *instructed* to say that the two defendants had paid the full purchase price, irrespective of whether or not that such was the fact. If such F be the fact, why did they not enter the witness box or call other evidence to prove their good faith, and submit their evidence to cross-examination? Their silence irresistibly gives rise to the conclusion that they have been less than honest in their conduct. I would therefore dismiss this appeal with costs.

G There only remains the plaintiff's cross-appeal against the judge's order on his claim for a set-off against the vendors. The plaintiff says that the first and second defendants owe him \$5,500, and that therefore if the plaintiff wins his case, this amount should be set off against the balance of the purchase price for the land. The plaintiff gave evidence to prove this debt, but the learned judge made no finding on it and said that as the first defendant was a bankrupt the plaintiff should prove this debt under the bankruptcy laws. With respect I agree with this decision. H

I Gill F.J.: As the facts relating to the action from which this appeal has arisen have been dealt with fully by my brother Suffian, I propose to refer to them but briefly.

The first and second defendants agreed in writing on 2nd November, 1957 to sell their land in question to the plaintiff for \$30,000. The plaintiff paid \$15,000 towards the agreed purchase price before 24th January, 1958, on which date he lodged a caveat against the land with the Registrar of Titles. On the

same day the third and fourth defendants approached him and offered to pay him \$10,000 to give up his rights under the agreement and to withdraw his caveat. He refused. On the morning of 30th January, 1958 he called at the Land Office and discovered that his caveat had been rejected, and that the land had been registered in the names of the third and fourth defendants in pursuance of a document of transfer in their favour, purporting to have been executed on 17th January, 1958 but stamped and presented for registration that very morning.

On a petition to the High Court against the rejection of his caveat, the plaintiff obtained an order on 5th May, 1958 directing the Registrar of Titles to register his caveat as on the date of its presentation, with a further direction that the caveat be removed after four weeks from the date of the order unless within that period the plaintiff brought an action for the specific performance of the sale agreement against the first and second defendants as the registered owners of the land at the time of the presentation of the caveat and against the third and fourth defendants as interested parties.

The plaintiff commenced his action on 31st May, 1958. The first and second defendants took no steps to defend the action, and the third and fourth defendants chose to adduce no evidence at the trial of the action. In the event, the court below, by a judgment delivered on 12th March, 1970, made an order for the specific performance of the agreement and such consequential orders as were necessary to register the land in the name of the plaintiff. It is against that judgment that the third and fourth defendants have now appealed.

The two major grounds of appeal are that as the third and fourth defendants had obtained a document of transfer of the land on 17th January, 1958, when they had no knowledge of the sale agreement in favour of the plaintiff, on the registration of that transfer on 30th January, 1958 they obtained an indefeasible title to the land by virtue of section 42(i) of the Land Code (F.M.S. Cap. 138), and that the order of court dated 5th May, 1958 was either a nullity or had the effect merely to maintain the *status quo* between the parties until the dispute between them was litigated upon. The arguments put forward by counsel for the plaintiff in support of the judgment appealed from briefly are that the order of 5th May, 1958, far from being a nullity, was a judgment *in rem* which was good against the whole world, that the plaintiff as purchaser was a beneficiary under the trust created by the sale agreement, and that in any event the plaintiff's equitable right to the land was prior in point of time to that of the third and fourth defendants.

I propose to deal with the points raised for and against the parties to this appeal in the order in which I think they ought to be dealt with.

The first question which calls for consideration is the effect of the sale agreement between the plaintiff and the first and second defendants. It was argued by counsel for the plaintiff both in the court below and here, on the authority of *Shaw v. Foster*⁽²⁾ and *Lysaght*

v. Edwards,⁽³⁾ that by virtue of the sale agreement the plaintiff became the equitable owner of the land and the first and second defendants thereafter held the land as bare or constructive trustees of the land for the plaintiff. A short answer to that argument is that whatever may be the relationship between the parties to a contract for the sale of land in England, the doctrines of English equity do not apply with equal force to a system of registration of title to land contained in a codifying enactment such as our Land Code. Quite apart from that, there are at least two English authorities which do not quite support the proposition put forward by counsel for the plaintiff. In *Rayner v. Preston*⁽⁴⁾ James L.J. said:

"I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*."

In *Cornwall v. Henson*⁽⁵⁾ Cozens-Hardy J. said:

"It is often stated that the effect of a contract for sale of land is to make the purchaser from that moment in equity owner of the land. I think, however, that this statement is too wide... if by reason of delay or other circumstances the Court declines to grant to the purchaser specific performance, the purchaser is not treated as being in equity owner of the property."

As regards the relationship between the parties to a contract for the sale of land to which a title can be obtained only by the registration of a valid transfer as required by law, the position would appear to be quite clear from what has been said in the following cases. Lord Hobhouse in delivering the judgment of the Privy Council in *Crowly v. Bergtheil*⁽⁶⁾ said:

"... by the law of Natal a purchaser of land, though he may have paid the price, is not until regular legal transfer the owner of the land, but is only one who has a claim against the vendor. To speak of him as the true owner in the language of an English Court of Equity, though the expression may be used in speech for brevity's sake, is not correct..."

The following passage from the judgment of the Privy Council in *Howard v. Miller*⁽⁷⁾ on appeal from the Supreme Court of Canada says much the same thing:

"It is sometimes said that under a contract for the sale of an interest in land the Vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity, would under all the circumstances of the case grant specific performance of the contract."

Speaking of section 54 of the Indian Transfer of Property Act, 1882, which provides that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property, Lord Somervell of Harrow, delivering the judgment of the Privy Council in *Abdulla v. Shah*⁽⁸⁾ said: "This negatives the English principle under which a contract for sale confers an equitable title on the purchaser."

Taking some of the local cases on the point, Thorne J. in *Tan Ah Boon v. the State of Johore*⁽⁹⁾ said:

"It would appear that the right of the purchaser under the system of conveyancing in which registration of title obtains is somewhat analogous to that of the Roman *Fidei Commissum*, so that the purchaser who has paid the whole of his purchase price has no estate, properly so called, in the land agreed to be purchased, but has rights which rest in contract, and which may or may not, according to the circumstances of the particular case, entitle him to sue and to invoke the equitable principle of specific performance. To state the matter in another way, the purchaser has no rights *in rem* but has only a right *in personam* against the vendor."

Speaking of the agreement for the sale of land in *Chin Cheng Hong v. Hameed & Ors.*⁽¹⁰⁾ Buhagiar J. said:

"...This agreement is a non-statutory and non-registrable instrument; such instruments do not create an estate or interest, legal or equitable, in the land but create a contractual right, a personal right of action; it passes no actual interest in the land that can be called an equitable estate in the ordinary sense, but an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purported to be conferred by the instrument (*vide Hogg, Registration of Titles to Land*, p. 116). As Lord Dunedin stated in *Haji Abdul Rahman v. Mohamed Hassan*:⁽¹¹⁾ 'The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.'"

In *Bachan Singh v. Mahinder Kaur & Ors.*⁽¹²⁾ Thomson J. (as he then was) said:

"I do not think I am overlooking anything that was said in the *Port Swettenham Rubber Company case*⁽¹³⁾ or *Abdul Rahman's case*.⁽¹⁴⁾ I feel compelled, however, to observe that in my experience a great deal of the difficulty and confusion which sometimes attend actions relating to land in this country arise from the no doubt well-intentioned efforts of counsel to force our local law into conformity with conceptions of the English law which really have very little relevance.

"To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code which has the same effect in our law as appearance before the Praetor in the law of Rome, delivery of seisin in the old English feudal law and infetment by registration in the Register of Sasines in the modern Scots law."

In *London and South Western Railway Company v. Gomm*⁽¹⁴⁾ Jessel M.R. said that "the right to call for a conveyance of the land is an equitable interest or equitable estate." S. K. Das on the Torrens System in Malaya says at pages 357 and 358 that subject to fulfilment of certain conditions a point is reached when the vendor becomes a constructive or bare trustee for the purchaser by operation of law. The conditions mentioned are (a) that there is in existence a contract sufficient in form and in substance so that there is no ground whatever for setting it aside as between the vendor and the purchaser, (b) that the purchaser has carried out all his obligations under the contract, (c) that there is in existence a title under the Code in the vendor (or in a third party who is able and willing at the instance of the vendor to complete the sale by registration), whether an undertaking is given to make out a title or not, at a date fixed for completion or, where no

A time is fixed, within a reasonable time from the date of the contract, and (d) that the vendor has no duties to perform other than those of executing the transfer and perfecting the purchaser's title by registration.

In my judgment, the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser. In other words, a purchaser does not get a title in equity until the vendor has done all that is necessary to perfect the purchaser's title. This was brought out quite clearly by Lord Wright in delivering the judgment of the Privy Council in *Abigail v. Lapin*,⁽¹⁵⁾ a case from Australia, when he said:

C "The Real Property Act, 1900 of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system which is in force throughout Australasia and in other parts as well. It is a system of the registration of title, not of deeds; the statutory form of transfer gives a title *in equity until registration*, (the italics are mine) but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto belonging or appertaining is to pass to the transferee. No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognised under the Real Property Acts. This was held in *Barry v. Heider*⁽¹⁶⁾ and in *Great West Permanent Loan Co. v. Friesen*;⁽¹⁷⁾ for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que trust*, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed."

In the Australian case of *Hawkins v. Gaden*⁽¹⁸⁾ Starke J. said:

G "A transfer or conveyance does not extinguish the contract of sale; but when a purchaser accepts title, and pays his purchase money and the vendor transfers or conveys the land sold to the purchaser, then the 'main duties' of the contract have been performed, and the parties are discharged in relation to them (*Williams' Vendor and Purchaser*, 3rd edition, Vol. II, pp. 988-989)".

H Where the purchase money has been paid and the purchaser has received the instrument of transfer and the title deeds from the vendor but omits to complete registration, if the vendor comes to set aside the sale, it would be a good answer to say that he has no interest in the land because he cannot retain the estate for a moment against the purchaser (*Crowly v. Bergtheil*⁽¹⁹⁾). Nor can the vendor or his personal legal representative resist the purchaser's claim to the land. Thus in *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamed*,⁽¹⁹⁾ where the purchase price was fully paid and a valid memorandum of transfer together with the document of title to the land was handed to the purchaser but the vendor, pending presentation of the instrument for registration, died so that by reason of

section 85(ii) of the Land Code the transfer could not be registered, it was held that legal personal representative of the deceased proprietor was a trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, was entitled to the land and to possession.

Unregistered interests in land may be recognised as interests in land, whenever in doing so they do not do violence to the principles and purposes of the Code, where the intention is to establish one estate in land only so as to ensure protection to *bona fide* purchasers for valuable consideration or decide priorities in the case of competing equities. Thus, a purchaser has a caveatable interest, and he can forbid, by registering a caveat, the subsequent registration of any transfer, charge or lease, until the caveat is removed. The rights of the purchaser are said to rest in equity in that the court, in the exercise of its equitable jurisdiction, may grant him specific performance of the contract by ordering the vendor to execute a valid and registrable document of transfer. In *Butler v. Fairclough*⁽²⁰⁾ Griffith C.J. said:

"It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognize equitable estates and rights except so far as they are precluded from doing so by the Statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings."

In this connection Buhagiar J. in *Chin Cheng Hong v. Hameed & Ors.*⁽¹⁰⁾ had this to say:

"This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat (*In re Registration of Caveat*⁽²¹⁾). The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse."

Sections 166, 167 and 168 of the Land Code provide both for presentation and registration of caveats, though a caveat is merely a notification of a claim. It is a "dealing" within the meaning of section 2 of the Code and a memorial whereof is made on the register. It is not, however, an instrument contemplated by section 96 as effectual to pass any land or any interest therein. It does not, therefore, alter the order of priority of conflicting dispositions as they stood before its lodgment. It is a unilateral act and no person can create rights in his own favour or enlarge or add to his existing proprietary rights by means of a caveat. It enables the caveator to retain the matter in *status quo* until his claim is adjudicated upon by the court and serves as a notice to the world at large of an outstanding equitable claim. The lodging of a caveat is really in the nature of the initiation of litigation, and only those persons should be entitled to initiate litigation who are entitled to litigate the matter of the dispute which is set up by the caveat (*per* Griffith, C.J. in *Municipal District of Concord v. Coles*⁽²²⁾). Section 169 of the Land Code provides that so long as the caveat remains in force, no dealings can be registered except in accordance with the requirement of such

A caveat. It is much more effective than an injunction against the proprietor for it is effective both against him and the land.

It would seem clear from what I have said so far that the plaintiff in the present case did not obtain an equitable title to the land by virtue of the sale agreement. What he obtained was an equitable interest of a contractual nature in the land, which he could protect by a restrictive entry in the Land Register. In other words, he acquired a caveatable interest in the land.

As stated by *Das* on the Torrens System in Malaya at page 324, the primary test for a caveatable interest may be put on an alternative basis: is the right of the person lodging a caveat capable (i) of specific performance or (ii) of being protected by an *interim* injunction? The learned author then goes on to quote the following passage from *Hogg* on the Australian Torrens System (1905) at page 1039:

"The close analogy between injunctions and caveats, and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the courts; at the same time it must be remembered that given the caveator's interest a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention of the courts."

Now, so long as all the formalities laid down in sections 166, 167 and 168 of the Land Code are complied with, the registrar or collector has no power to reject a caveat. He cannot require the caveator to establish his claim. His duty goes no further than this that, if the claim of the caveator to an interest in land is *prima facie* good, the caveat should be registered. In other words, the registrar is not called upon to determine the claim but merely to determine whether, on the facts stated in the caveat and verified by the affirmation of the caveator or his agent as required by section 167, there is possibly an interest in land accruing to the caveator (see *Das* on the Torrens System in Malaya, page 346).

It follows from what I have just said that the Registrar of Titles was mistaken in law in rejecting the caveat in the present case. His refusal to register the caveat was a "decision" as defined in section 237(v) of the Land Code, so that the plaintiff being dissatisfied with that decision was entitled to petition the High Court under section 237(iii) for such order as the circumstances of the case might require. This was exactly what the plaintiff did. His petition was served on the registrar, but not on the third and fourth defendants who were clearly a necessary party to the proper hearing of the petition. It is upon this ground and on the authority of *Craig v. Kanssen*⁽²³⁾ that it is contended for the appellants that the order made by the High Court on 5th May, 1958 was a nullity. I do not think it would be correct to call that order a nullity, although it was clearly an order which the appellants were entitled *ex debito justitiae* to have set aside without having to appeal against it. As they chose not to do so, even after the writ in the present case was

served on them, they cannot now be heard to complain about it.

It is to be observed that section 237(iii) of the Land Code empowers the High Court to "make such order as the circumstances of the case may require". That power, in my judgment, is sufficiently wide to enable the court to make an order that a caveat which has been wrongly rejected be registered with effect from the date of its presentation. Counsel for the respondent pointed out that section 240 of the Land Code gives the court a similar power. I do not think so. As *Das* on Torrens System in Malaya says at page 176, section 240 of the Code is designed to provide relief where a memorial has already been made in terms of the instrument presented for registration in proceedings by a person having a *locus standi*. The High Court may by order direct the proper registering authority "to cancel, correct, substitute or issue any document of title, or make any memorial, or otherwise to do such acts or make such memorials as may be necessary to give effect to the judgment or order of the court" but not so as to affect rights of third parties which may have intervened before such order is presented for registration.

As I have said before, it has been argued on behalf of the respondent that the order of court dated 5th May, 1958 was a judgment *in rem*. I do not think I can accept that argument. The order clearly said nothing as to the status of any person or property or as to the right or title to the latter. It made no disposition whatever as to the land in question. It merely enabled the caveator to retain the matter in *status quo* until his claim was adjudicated upon. This would appear to be clear from the terms of the order itself. In any event, the order did not go on to adjudicate upon the validity or otherwise of the registration of the transfer in favour of the appellants. That was a matter which was left to be decided in proper proceedings. Hence the action from which this appeal has been brought.

That brings me to the major ground of appeal in this case, namely, that on the registration of their transfer the third and fourth defendants obtained an indefeasible title to the land. This ground is founded on the decision of the Privy Council in *Frazer v. Walker*⁽²⁴⁾ to the effect that, the conception of indefeasibility being central in the system of land registration, so long as land stands registered in the name of a particular person such registration constitutes conclusive evidence that that person is in fact the registered proprietor of the land unless and until his registered title is cancelled or set aside in accordance with some relevant provision of the law. Such relevant provision of the law in relation to the present case is contained in section 42 of the Land Code which reads as follows:—

- "42. (i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.
(ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.
(iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of

an insufficient or void instrument such registration shall be void.

- (iv) Nothing in sub-sections (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him.
(v) When at the time the proprietor becomes registered a tenant shall be in possession of the land under an unregistered lease or agreement for a lease or for letting for a term not exceeding one year the title of the tenant under such lease or agreement shall prevail.
(vi) Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law."

It is to be observed that section 42(iv) of the Land Code gives complete protection to the proprietor who acquires title *bona fide* and for valuable consideration from the identical person appearing in the register as proprietor, notwithstanding any infirmity of the latter's title. A registered proprietor may thus himself have a title which is impeachable and yet be able to give an unimpeachable title to a *bona fide* purchaser for value. Section 42(v) provides that the right of a tenant in actual occupation under an unregistered lease or agreement for a lease or for letting for a term not exceeding one year shall prevail, so that the interest of the purchaser of the land who becomes the registered proprietor is *pro tanto* diminished. But the statutory restriction thus imposed on his right to immediate possession is transitory (see *Das* on Torrens System in Malaya, pp. 166-167). Obviously sub-section (v) has no relevance to this appeal. Sub-section (iv) also does not apply, because even if the third and fourth defendants acquired title *bona fide* and for valuable consideration there is no evidence of the first and the second defendants' registration of title having been obtained by fraud or misrepresentation or by forgery or by means of an insufficient or void instrument.

It is in sub-sections (ii), (iii) and (vi) that the exceptions to the rule of indefeasibility are laid down. There being no allegations about the third and fourth defendants having obtained registration of the transfer by forgery or by means of an insufficient or void instrument, sub-section (iii) does not apply. As regards sub-section (ii), the plaintiff pleaded fraud, but the learned trial judge found as a fact that the circumstances under which the registration was effected, though they might give rise to a strong suspicion against the third and fourth defendants, did not warrant a finding of fraud. The plaintiff has not cross-appealed against that finding. That finding was made clearly on the ground that there was no evidence to show that the third and fourth defendants had any knowledge of the sale agreement on 17th January, 1958 when the memorandum of transfer in their favour was executed. It is to be observed, however, that the transfer was not stamped until 30th January, 1958, so that before that date it was not a registrable document in the true sense of the word. By that time, of course, the third and fourth defendants were aware of the existence of the sale agreement. I would go a step further and say that there is a reasonable inference to be drawn from

the evidence that the appellants knew about the agreement before 24th January, 1958. If they did not, what was the point in their attempting to buy up the plaintiff's right under the sale agreement on that day?

I now come to section 42(vi) of the Land Code. It was sought to argue in *Yong Joo Lin & Ors. v. Fung Poi Fong*⁽²⁵⁾ that section 42(vi) referred to various circumstances by which the title of the proprietor could be defeated under the provisions of the Land Code itself, such as the provisions under sections 30(iv), 37(i), 102(ii), 217 and 240. Terrell Ag. C.J. (S.S.) rejected that argument, pointing out that the sections themselves provided for the defeasance of the registered proprietor's title in the particular circumstances referred to, so that the application of section 42(vi) to those circumstances would be redundant and unnecessary. His Lordship went on to say at page 69:

"The inference, therefore, is that the sub-section was inserted for some other purpose, that purpose being the protection of interests which could previously have been protected by a caveat or by some memorandum on the Register."

The term "operation of law" in sub-section (vi), as *Das* on Torrens System in Malaya points out at page 235, is a generic term deliberately used by the legislature to grant relief in cases where contractual or conscientious obligations (importing a breach of duty to which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity. The third and fourth defendants were obviously not under any contractual obligations to the plaintiff, but I do not think it can be said that they were under no conscientious obligations which can be imposed on them either at law or in equity. I say this because the execution by the first and second defendants of the transfer, which until 30th January, 1958 was but an unregistered instrument in statutory form, did not of itself confer on the third and fourth defendants any superiority in equity over the earlier equity of the plaintiff under the sale agreement.

As I have already said, the third and fourth defendants had knowledge of the earlier equity of the plaintiff before the date of registration of their transfer. The third and fourth defendants produced no evidence at the trial to show that they obtained their transfer for value in good faith and without notice of the plaintiff's contract with the first and second defendants. Section 26 of the Specific Relief (Malay States) Ordinance, 1950 provides that "except as otherwise provided by this Chapter, specific performance of a contract may be enforced against —

- (a) either party thereto;
- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;"

It was decided by the Privy Council in *Bhup Narain Singh v. Gokhul Chand Mahton*⁽¹⁾ that where a purchaser under a contract for the sale of immovable property claims for specific performance against a person claiming title from the vendor under a registered sale-deed executed after the contract, the onus is upon

- A the defendant to prove that he is a *bona fide* purchaser for value without notice of the earlier contract so as to bring himself within the exception provided by section 27(b) of the Indian Specific Relief Act, 1877, which is *in pari materia* with section 26(b) of our Ordinance. As the appellants in the present case, being the defendants in the court below, failed to discharge that onus they are not entitled to the benefit of the exception contained in section 26(b) of the Ordinance.

- B I now come to the question of priority as between equities. The fundamental principle of the Torrens System is that where the register is clear, in the absence of fraud, the owner of the later equity who is in possession of the issued document of title succeeds in obtaining an unimpeachable title by registering his dealing. In other words, the pre-existing admitted equitable right may be defeated by a *bona fide* supervening title obtained by a registered transfer, the rule being that one who succeeds in the scramble to get on the register emerges victorious. But as I have already said, the execution by the proprietor of an unregistered instrument in statutory form does not of itself confer any superiority in equity over the earlier equity. Something more is needed. Lord Macnaghten in the case of *Bank of New South Wales v. O'Connor*⁽²⁶⁾ said that where acts of omission or commission are disclosed "a Court of Equity can take all the circumstances of the case into consideration, and do complete justice between the parties, however complicated their relations may be". Can it be said that the third and fourth defendants obtained a *bona fide* supervening legal title by their registered transfer? The answer to that question on the evidence and all the surrounding circumstances of the case is clearly in the negative.

- D The effect of the order by the High Court on 5th May, 1958 was to restore the *status quo* as between the parties on 24th January, 1958, notwithstanding the fact that the transfer in favour of the third and fourth defendants had in fact been registered. There being no evidence of the transfer having been obtained for value in good faith and without notice of the plaintiff's contract, the question as regards priority between the two equities falls to be decided as on 24th January, 1958. As the plaintiff's contract of sale was prior in point of time to the transfer to the third and fourth defendants, his rights are *prima facie* superior to the rights of the defendants. The maxim of equity which applies is "*qui prior est tempore potior est jure*" (he has the better title who was first in point of time), unless upon well-settled principles there is some reason why the later equity should be regarded as having priority over that which was earlier in point of time. Taking the whole of the evidence in the case, I can find no ground upon which the claim of the third and fourth defendants can take priority over the claim of the plaintiff.

- E For the reasons I have stated I would dismiss this appeal with costs. And I agree with my brother Suffian that the cross-appeal should also be dismissed.

Azmi L.P. concurred.

Appeal and cross-appeal dismissed.

Solicitors: Lovelace & Hastings; Skrine & Co.